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## There's No "Gender" in Team: Developing State Policies for the Inclusion of the Transgender Interscholastic Athlete

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**THERE'S NO "GENDER" IN TEAM: DEVELOPING STATE  
POLICIES FOR THE INCLUSION OF THE TRANSGENDER  
INTERSCHOLASTIC ATHLETE**

*Brianna Wepler\**

**ABSTRACT**

The transgender athlete is a relatively new concept challenging the norm of gender division in sports. Multiple states across the United States have yet to update their policies to include the transgender athlete in interscholastic athletics. State policies that do include transgender student athletes are currently being challenged on the grounds that they violate Title IX of the Educational Amendments to the 1964 Civil Rights Act. This review considers the different state policies dictating the inclusion of transgender student athletes in school sports. After evaluating the impact of omitting transgender students from participating on sports teams, this review maintains that every state should implement an inclusive policy to avoid discriminating against young transgender students. While these individuals have many obstacles to face in life, high school athletics should not be one of them.

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## I. THE STARTING LINE

In February of 2020, Andraya Yearwood stood at the starting line for the 4x200 meter dash at the 2020 Class S Indoor State Championships, held in New Haven, Connecticut.<sup>1</sup> As anchor for her team, Yearwood grabbed the baton and sprinted her way to second place, only to finish closely behind Terry Miller.<sup>2</sup> The seemingly normal high school girl's track competition ultimately sparked national uproar over the state of Connecticut's transgender policies.<sup>3</sup> Specifically, three Connecticut girls filed a Title IX complaint alleging that the two transgender athletes, Yearwood and Miller, prevented other runners from winning races and potentially ruined their chances for college scholarships.<sup>4</sup>

Yearwood and Miller's story brings to light an ongoing dispute over who gets to play on high school sports teams. The United States currently lacks a universal policy regarding the inclusion of transgender athletes in student athletics; instead, states create their own guidance for inclusion.<sup>5</sup> States with policies that allow transgender students to play on sports teams with their preferred gender are being challenged on the grounds that they violate Title IX of the Educational Amendments to the 1964 Civil Rights Act,<sup>6</sup> hereinafter "Title IX," rights of "cisgender" student athletes. A cisgender individual is defined as "a person whose sense of personal identity and gender corresponds with their birth sex."<sup>7</sup> In contrast, a transgender individual

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<sup>1</sup> Katie Barnes, *The Battle Over Title IX and Who Gets to Be a Woman in Sports: Inside Debate the Raging National*, ESPN (June 23, 2020), [https://www.espn.com/espnw/story/\\_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate](https://www.espn.com/espnw/story/_/id/29347507/the-battle-title-ix-gets-woman-sports-raging-national-debate).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Dan Brechlin, *Conn. High School Transgender Athletes 'No Longer Want to Remain Silent' Following Title IX Complaint*, HARTFORD COURANT (June 20, 2019, 6:00 AM), <https://www.courant.com/sports/high-schools/hc-sp-transgender-policy-runners-respond-20190619-20190620-5x2c7s2f5jb6dnw2dwpftiw6ru-story.html>.

<sup>5</sup> *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Oct. 20, 2020).

<sup>6</sup> 20 U.S.C. § 1681 (2018). "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . ." *Id.*

<sup>7</sup> *Cisgender*, DICTIONARY, <https://www.dictionary.com/browse/cisgender?s=t> (last visited Oct. 23, 2020).

is defined as "a person whose sense of personal identity and gender does not correspond with their birth sex."<sup>8</sup>

Part II of this Note will introduce additional gender terminology and discuss current hardships of transgender youths. Part III will recount the history of Title IX and the Department of Education's stance on transgender athletes. Part IV examines the history of transgender athletes, introduces past professional athletes who participated in professional sports, and discusses the NCAA and transgender college athletes. Part V discusses and defines the varying policies and regulations, or lack thereof, throughout the states that address transgender participation. Part VI reflects upon previous court decisions regarding the application of Title IX and examines how the courts have handled transgender discrimination cases in schools and employment. Part VII dives into the current discourse in Connecticut regarding Yearwood and Miller, and the current lawsuit against the Connecticut Interscholastic Athletic Conference. Part VIII argues for the implementation of a universal policy across the states and the introduction of case law specific to transgender youth and Title IX. Part IX acknowledges the argument in favor of barring transgender students from participating in sports with their gender identity, but finds it less compelling than the argument against discrimination based on gender identity. Finally, Part X concludes by discussing President Biden's Executive Order regarding discrimination based on sexual orientation and gender identity.

Transgender rights are growing with the current times, as people become more accepting and understanding; however, these individuals still have many obstacles to face. Discrimination in high school sports at such a young age should not be one of them.

## II. TRANSGENDER INDIVIDUALS

For the purposes of clarity in this Note, the terms "girl," "boy," "male," and "female" are used according to their traditional meaning, despite transgender males referring to themselves solely as female, and transgender females referring to themselves as male. A transgender woman is a woman who was assigned male at birth, and a transgender

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<sup>8</sup> *Transgender*, DICTIONARY, <https://www.dictionary.com/browse/transgender#> (last visited Oct. 23, 2020).

man is a man who was assigned female at birth.<sup>9</sup> Moreover, it is important to note the difference between sexual orientation and gender identity. Sexual orientation describes whom a person is attracted to, while gender identity is the internal knowledge of a person's own gender.<sup>10</sup> Lastly, it is important to distinguish the difference between a transgender person and a person who has intersex conditions. Transgender individuals are not born with physical characteristics that distinguish them from others, despite having a gender identity that is different from their bodies.<sup>11</sup> Someone with intersex characteristics is born with physically mixed bodies with respect to sexual characteristics like chromosomes, internal reproductive organs, and external genitalia.<sup>12</sup>

In 2021, only sixteen states allow transgender athletes to participate in sports in accordance with their "gender identity,"<sup>13</sup> meaning the gender that the individual personally identifies with.<sup>14</sup> Transgender youth face a multitude of challenges at school including bullying from not only their peers, but also school officials.<sup>15</sup> The Gay, Lesbian and Straight Education Network (GLSEN) found over seventy-five percent of transgender students feel unsafe at school, and those who are able to withstand this fear have a significantly lower GPA and miss out on more school than their cisgender peers.<sup>16</sup> These transgender students constantly worry about retaliation for their

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<sup>9</sup> *Frequently Asked Questions About Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

<sup>10</sup> *Id.*

<sup>11</sup> Dr. Pat Griffin & Helen Carroll, *NCAA Inclusion of Transgender Student-Athletes*, NCAA (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> *See K-12 Policies*, *supra* note 5.

<sup>14</sup> *Gender Identity*, DICTIONARY, <https://www.dictionary.com/browse/gender-identity?s=t> (last visited Oct. 23, 2020).

<sup>15</sup> *Youth & Students*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/youth-students> (last visited Nov. 17, 2020).

<sup>16</sup> *Id.*

differences,<sup>17</sup> rather than focusing on their education.<sup>18</sup> All of these factors contribute to a higher suicide attempt rate for transgender youths.<sup>19</sup> A recent study published by the American Academy of Pediatrics reported that more than half of transgender male teen survey participants reported attempting suicide in their lifetime.<sup>20</sup> There is an urgency to create safer and more welcoming communities for transgender youths in order to lower these alarming rates.<sup>21</sup>

Preventing transgender students from participating in school sports is harmful for everyone.<sup>22</sup> When a school district denies transgender students the opportunity to participate on a sports team concurrent with their gender identity, it reinforces and affirms the transgender student's social status as an outsider or misfit "who deserves the hostility they experience from peers."<sup>23</sup> Furthermore, forbidding a transgender woman from playing with cisgender women ultimately hurts women by inviting gender policing that could subject any woman to tests to determine if they are a "real" woman just because they seem too masculine or too good at their sport.<sup>24</sup>

### III. A BRIEF HISTORY OF TITLE IX

Over forty-eight years ago, Congress passed Title IX of the Educational Amendments to the 1964 Civil Rights Act, which states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving

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<sup>17</sup> *Id.* School officials retaliate against transgender students by punishing them for wearing clothes consistent with their gender identity, denying access to restrooms consistent with their gender identity, and denying opportunities to go on field trips or participate in sports. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *New Study Reveals Shocking Rates of Attempted Suicide Among Trans Adolescents*, HUMAN RTS CAMPAIGN (Sept. 12, 2018), <https://www.hrc.org/news/new-study-reveals-shocking-rates-of-attempted-suicide-among-trans-adolescen>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, ACLU (April 30, 2020), <https://www.aclu.org/news/lgbt-rights/four-myths-about-trans-athletes-debunked>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

federal financial assistance.”<sup>25</sup> The Supreme Court opined the main objectives of Title IX were to avoid discriminatory practices supported by federal resources and provide effective protection for citizens affected by these practices.<sup>26</sup> Prior to Title IX, women had significantly unequal access to educational programs to that of men.<sup>27</sup> Title IX now prevents sex based discrimination from a multitude of school offered programs including admissions, financial aid, post-secondary institutions, student services, counseling, and athletics.<sup>28</sup>

A quick examination of the text clearly shows that Congress did not give a specific definition of the term “sex.”<sup>29</sup> It is unclear whether sex is strictly based on one’s biological gender given at birth, or if the term could be interpreted to include gender identity. Additionally, the statute does not state the term “biological” before sex.<sup>30</sup> However, it is unlikely that Congress ever intended the language to include the prohibition of discrimination against transgender individuals.<sup>31</sup> In its own interpretation of how Title IX should apply to transgender students, the Department of Education’s Office for Civil Rights (DOE) wrote in an opinion letter that “[w]hen a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity.”<sup>32</sup> The Department of Education continued to enforce this policy in its 2016 “Dear Colleague Letter on Transgender Students,” where the department summarized school’s Title IX obligations for transgender students.<sup>33</sup> The letter stated that the student’s gender identity is to be treated as the student’s sex for purposes of Title IX when implementing regulations.<sup>34</sup> This policy took a huge turn in 2017, when President Trump’s DOE rescinded its prior policy

<sup>25</sup> 20 U.S.C. § 1681 (current through P.L. 116-259).

<sup>26</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 667, 704 (1979).

<sup>27</sup> *Equal Access to Education: Forty Years of Title IX*, U.S. DEP’T OF JUST. TITLE IX REP (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> 20 U.S.C. § 1681, *supra* note 25.

<sup>30</sup> *Id.*

<sup>31</sup> *Johnston v. Univ. of Pittsburgh of Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 674 (W.D. Pa. 2015).

<sup>32</sup> *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 737 (4th Cir. 2016).

<sup>33</sup> Letter from U.S. Dep’t of Justice & U.S. Dep’t of Educ. to Colleagues (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>34</sup> *Id.*

statements regarding Title IX from the previous letter.<sup>35</sup> The DOE revoked its previous letter because it believed it did not contain extensive legal analysis and withdrew the document in order to consider the legal issues involved.<sup>36</sup> According to the DOE, the ambiguous language of the statute should now be interpreted as regarding an individual's biological sex given at birth.<sup>37</sup>

#### IV. TRANSGENDER ATHLETES

The idea of the transgender athlete is a relatively new concept that is challenging the norm of gender division in sports. The sports world has foundationally been divided into the two binary categories of male or female.<sup>38</sup> Only thirteen years ago, Keelin Godsey became the first openly transgender student-athlete in the National Collegiate Athletic Association (NCAA).<sup>39</sup> However, transgender athletes, like Renee Richards, have been competing in sports long before Godsey.<sup>40</sup> Richards, originally Richard Raskind, participated in the U.S. Open between 1953 and 1960.<sup>41</sup> Richards underwent sex reassignment surgery in 1975, changed his name to Renee, and was banned from competing in the women's tour.<sup>42</sup> Richards brought this issue before the court in *Richards v. United States Tennis Association*.<sup>43</sup> Richards claimed that she was prevented from participating in the U.S. Open as a woman because the U.S. Tennis Association required her to take a sex-chromatin test to determine if she was female.<sup>44</sup> The court held that it was not striking down the test; however, it could not be the sole criterion when the circumstances warrant consideration of other

<sup>35</sup> Letter from U.S. Dep't of Justice & U.S. Dep't of Educ. to Colleagues (Feb. 22, 2017) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Rachel Stark-Mason, *A Time of Transition*, NCAA, <http://www.ncaa.org/static/champion/a-time-of-transition> (last visited Oct. 23, 2020).

<sup>39</sup> *Id.*

<sup>40</sup> Mike Segar, *Meet Renee Richards, The Only Tennis Player To Have Played In US Open Men's And Women's Events*, REUTERS (Aug. 29, 2019), <https://www.rt.com/sport/467548-renee-richards-us-open-transgender>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 400 N.Y.S.2d 267 (N.Y. App. Div. 1977).

<sup>44</sup> *Id.*

factors.<sup>45</sup> Additionally, the court stated, “[w]hen an individual . . . finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.”<sup>46</sup>

### A. Transgender Males in Sports

The discussion surrounding transgender athletes disproportionately impacts transgender girls.<sup>47</sup> Transgender boys have been largely invisible in the media because the trans athlete discussion focuses on the potential of unfair physical advantages of transgender girls.<sup>48</sup> Aryn Butherus, a transgender boy, asked to switch from the girls basketball team to the boys at his high school in Wichita, Kansas.<sup>49</sup> He was told by administration that transgender people do not belong in sports because of the unfair advantage they pose.<sup>50</sup> As a five foot, four inch transgender boy who was not taking any testosterone, Butherus clearly did not pose any advantage playing on the boys basketball team.<sup>51</sup> Transgender male athletes such as Chris Mosier, the first openly transgender athlete to qualify for Team USA, and Schuyler Bailar, the first openly transgender Division 1 NCAA swimmer, demonstrate that transgender boys can compete with cisgender boys.<sup>52</sup> Transgender athletes “just want the opportunity to play sports in a way that affirms their gender and sense of self, just like any other kid.”<sup>53</sup> Legislation being introduced nationwide focuses mostly on transgender girls, and is not intended to ban transgender boys.<sup>54</sup> Although transgender males are not the focus of this Note, it

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Britni De La Cretaz, *What About the Trans Athletes Who Compete—And Win—in Men’s Sports?*, INSIDE HOOK (Jan. 20, 2021 8:39 AM), <https://www.insidehook.com/article/sports/trans-athletes-win-boys-sports>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

is crucial to acknowledge the disproportionate representation they receive in this fight for equality.<sup>55</sup>

## V. STATE POLICIES ON TRANSGENDER ATHLETES

States follow their own policies in determining the inclusivity of their high school athletic programs. State policies vary from inclusive, partially inclusive and discriminatory.<sup>56</sup> Additionally, ten states do not have any statewide guidance on regulations that should be implemented in schools.<sup>57</sup> Schools located in those states create their own policies or decide on a case-by-case basis.<sup>58</sup>

### A. Inclusive Policies

Inclusive policies allow students to participate on single-sex sports teams solely based on their gender identity, regardless of their birth certificate.<sup>59</sup> These policies facilitate full inclusion of transgender individuals without a need for medical proof of their gender transition.<sup>60</sup> Inclusive policies allow all students to have the same opportunity to engage in the benefits of school sports.<sup>61</sup> There are currently only sixteen states with fully inclusive policies.<sup>62</sup> These states include New Jersey, Maryland, Colorado, and Oregon.<sup>63</sup>

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<sup>55</sup> *Id.*

<sup>56</sup> See *K-12 Policies*, *supra* note 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> The California Interscholastic Federation's inclusive policy states: "All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records." *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The sixteen states are California, Colorado, Connecticut, Florida, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. *Id.*

<sup>63</sup> OREGON SCHOOL ATHLETIC ASSOCIATION, OSSA 2019 HANDBOOK (2019), [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_88d63f6707cf4a6b87b3ee897c14914a.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_88d63f6707cf4a6b87b3ee897c14914a.pdf). Oregon has a fully inclusive policy that states transgender students may participate in the category associated with their gender identity without any restrictions. *Id.*

## B. Partially Inclusive Policies

Partially inclusive policies require students to provide proof that they are legally recognized as their gender identity.<sup>64</sup> In some cases, these partially inclusive policies require transgender athletes to undergo hormone treatments to either increase or decrease their testosterone levels in order to be eligible to participate on a team with the gender they self-identify as.<sup>65</sup> Fourteen states have partially inclusive policies,<sup>66</sup> including Virginia<sup>67</sup> and Oklahoma.<sup>68</sup>

## C. Discriminatory Policies

Discriminatory policies restrict transgender students from participating with their gender identity under any circumstances.<sup>69</sup> These restrictive policies limit transgender students from benefiting from the same athletic opportunities as their cisgender peers. Twelve

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The fourteen states are Arizona, Delaware, Illinois, Maine, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Virginia, Wisconsin, and Wyoming. *Id.*

<sup>67</sup> VIRGINIA HIGH SCHOOL LEAGUE, UPDATED TRANSGENDER POLICY (2014), [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_d4010e9ceba34d88a64fc20ff8dda548.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_d4010e9ceba34d88a64fc20ff8dda548.pdf).

Virginia's old policy required students to have had sex reassignment surgery in order to participate in sports with their identified gender. The new policy eliminated such strict requirements; however, the new policy requires transgender individuals to be verified as having "a consistent identity different than the gender listed on the student's official birth certificate," or have begun hormone treatments. The students are required to have their identity verified by multiple officials. *Id.*

<sup>68</sup> See *K-12 Policies*, *supra* note 5.

<sup>69</sup> *Id.*

states,<sup>70</sup> including Indiana<sup>71</sup> and Mississippi,<sup>72</sup> have restrictive and discriminatory policies for transgender student-athletes.<sup>73</sup> Policies in these states range from requiring students to have undergone sex reassignment surgery,<sup>74</sup> to strictly allowing students to only participate on teams with their birth genders,<sup>75</sup> regardless of their gender identity or steps they have taken to transition into said gender.<sup>76</sup> These states argue that their policies are implemented to ensure fair play for student athletes.<sup>77</sup>

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<sup>70</sup> *Id.* The twelve states with discriminatory policies are Alabama, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Nebraska, New Mexico, Tennessee, and Texas. *Id.*

<sup>71</sup> INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, GENDER POLICY, (2020), [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_1d32e085305d4e51aad243797a80ea43.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_1d32e085305d4e51aad243797a80ea43.pdf). Indiana's restrictive policy does not permit transgender students to participate on teams with the gender they identify as, unless they have undergone a sex change before puberty. If they have undergone a sex change after puberty, the individual must provide evidence that surgical genitalia changes were completed, proper hormones for the assigned sex have been administered, and the sex change has been conferred with all proper governmental agencies. *Id.*

<sup>72</sup> Caitlin McFall, *Mississippi Governor Signs Bill Banning Transgender Athletes From Female Sports*, FOX NEWS (Mar. 12, 2021) <https://www.foxnews.com/politics/mississippi-governor-signs-bill-banning-transgender-athletes-from-female-sports>. Mississippi was a state without a policy on transgender athletes. Governor Tate Reeve's responded to President Biden's Executive Order calling on schools to include transgender athletes, by signing into legislation a statewide ban in public schools for transgender athletes to compete in female sports. *Id.*

<sup>73</sup> See *K-12 Policies*, *supra* note 5.

<sup>74</sup> NEBRASKA SCHOOL ACTIVITIES ASSOCIATION, GENDER PARTICIPATION POLICY, (January 14, 2016) [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_154152b437f24ef881ea66740030ea45.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_154152b437f24ef881ea66740030ea45.pdf). The Nebraska School Activities Association's Gender Participation Policy states that when a transgender student applies to play on their preferred gender team, they must submit medical documentation of hormonal therapy, sexual reassignment surgery, physiological testing, counseling, and other medical or psychological interventions on behalf of the student. *Id.*

<sup>75</sup> GEORGIA HIGH SCHOOL ASSOCIATION, *INTERPRETATION OF GENDER DESIGNATION*, (2020) <https://www.ghsa.net/interpretation-gender-designation>. The Georgia High School Association only permits students to play on sports teams with the gender identified on their birth certificate. *Id.*

<sup>76</sup> See *K-12 Policies*, *supra* note 5.

<sup>77</sup> NEBRASKA SCHOOL ACTIVITIES ASSOCIATION, *supra* note 74. The Nebraska School Activities Association states that the goals of its gender policies are to provide equal opportunities, level the playing field, and protect the health and safety of all

#### D. States Without Policies

There are nine states that do not follow a statewide policy, allowing each school to either create their own rules and regulations for transgender student-athlete participation or decide on a case-by-case basis.<sup>78</sup> These policies can be inclusive or restrictive, without being consistent throughout the state.<sup>79</sup> Some states, such as Hawaii, have an inclusive policy for transgender students regarding bathrooms, locker rooms, and dress code; however, these states have no guidelines on participation for transgender athletes in sports.<sup>80</sup> Perhaps transgender athletes in these states have yet to challenge their eligibility to play sports with their gender identity. However, as seen with the growth of cases of transgender bathroom regulations, the controversy over transgender athletes will likely rise too. The determinative factor in whether a transgender athlete is discriminated against in these states is solely which school district the student's parents enrolled them.<sup>81</sup> While other states, such as Kansas<sup>82</sup> and Alaska,<sup>83</sup> leave it to each school district to decide its own policy, there

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students by assuring that female students are protected from physical injury as a result of participating in activities with biological males or androgen-supplemented biological females. *Id.*

<sup>78</sup> See *K-12 Policies*, *supra* note 5. The nine states being Alaska, Hawaii, Kansas, Michigan, Montana, Pennsylvania, South Carolina, Tennessee, West Virginia. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Pat Griffin, *Developing Policies for Transgender Students on High School Teams*, NFHS (Sept. 8, 2015), <https://www.nfhs.org/articles/developing-policies-for-transgender-students-on-high-school-teams>.

<sup>82</sup> KANSAS STATE HIGH SCHOOL ACTIVITIES ASSOCIATION, KSHSAA POLICY FOR TRANSGENDER STUDENT PARTICIPATION (last visited November 18, 2020) [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_9a092ec75179475a8aa591c4dc939d9a.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_9a092ec75179475a8aa591c4dc939d9a.pdf).

The Kansas State High School Activities Association allows school districts to determine their own policy; however, if they allow a transgender student to play on a team opposite their birth gender, they must notify the KSHSAA prior to allowing participation and then KSHSAA handles all rulings if there is a dispute. *Id.*

<sup>83</sup> *Alaska's New Policy For Transgender Prep Athletes: Schools Can Make Their Own Rules*, ANCHORAGE DAILY NEWS (Sept. 28, 2016), <https://www.adn.com/sports/article/alaskas-new-transgender-policy-high-school-athletes-asaa-will-accept-gender/2016/05/05/>. The Alaska School Activities Association lets each school district make its own policy. If there is no written policy, students “may only participate based on their gender assigned at birth.” *Id.*

is still some influence to deter each school district from allowing an inclusive transgender student athlete policy.<sup>84</sup>

## VI. CURRENT TITLE IX PROTECTION IN SCHOOLS

The courts extended Title IX to prohibit harassment against transgender students.<sup>85</sup> However, it has yet to be interpreted to include protection of these students in school athletic programs. In *Miles v. New York University*,<sup>86</sup> the United States District Court held that Title IX protects a man who identifies as a transgender woman from harassment.<sup>87</sup> The court acknowledged that, "the legislators may not have had in mind the specific fact pattern here involved."<sup>88</sup> Further, the court held that Title IX was enacted specifically to protect against sexually harassing behavior.<sup>89</sup> Additionally, courts have juggled with the issue of transgender students using the bathroom consistent with their gender identity.<sup>90</sup> For example, the Seventh Circuit Court held in *Whitaker v. Kenosha Unified School District*<sup>91</sup> that "[a] policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."<sup>92</sup> Further, the court stated that the transgender individual was subject to different rules and treatment than non-transgender students, another violation of Title IX.<sup>93</sup>

The Court of Appeals for the Third Circuit has relied on the holding in *Whitaker* when considering a school's policy on transgender students using bathrooms and locker rooms consistent with their

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<sup>84</sup> See *K-12 Policies*, *supra* note 5.

<sup>85</sup> *Miles v. New York University*, 979 F. Supp. 248 (S.D.N.Y. 1997).

<sup>86</sup> *Id.* at 250.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The Plaintiff, a transgender student, claimed the professor made unwelcome sexual advances at one-on-one tutorial sessions. Plaintiff filed a written complaint with New York University's Sexual Harassment Committee, who served the professor with a written reprimand, but allowed him to continue teaching and still be eligible for tenure. Plaintiff left NYU and suffered from mental distress, anguish and pain due to the Defendant's actions. *Id.* at 249.

<sup>89</sup> *Id.*

<sup>90</sup> *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1049.

<sup>93</sup> *Id.*

gender identity.<sup>94</sup> The court rejected the claim that the school district's policy of allowing transgender students to use the bathroom they preferred infringed on cisgender students' right to privacy and Title IX rights.<sup>95</sup> The court stated, "we do not view the level of stress that cisgender students may experience because of appellees' bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity."<sup>96</sup> By the same standards, restricting a transgender student from playing on a team with their identified gender would violate Title IX by punishing the individual for not conforming to their biological gender. Forcing transgender students to play on sports teams inconsistent with their gender identity is equivalent to forcing transgender students to use facilities that are not aligned with their gender identity. As the Third Circuit noted, this is "society reducing them to their genitals."<sup>97</sup>

These previous holdings are not specific to Title IX's protection of transgender inclusion on school sports teams based on gender identity rather than biological sex.<sup>98</sup> However, they do show that Title IX protects against harassment on the basis of gender identity. Additionally, they suggest that the obstacles transgender students already face in schools are far greater than those of their cisgender peers.<sup>99</sup> The same interpretations should apply to school athletics.

The Supreme Court's recent groundbreaking decision in *Bostock v. Clayton County*<sup>100</sup> involved discrimination based on gender identity in employment.<sup>101</sup> The Court ruled that Title VII of the Civil Rights Act of 1964 prohibits sexual discrimination against employees

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<sup>94</sup> *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 528 (3d Cir. 2018). The Plaintiffs, a group of cisgender students, brought this appeal against Defendant School District because they believed the district's policy allowing transgender students to use the bathroom consistent with their gender identity, violated the cisgender students' constitutional rights of bodily privacy, and their Title IX rights. *Id.* at 525.

<sup>95</sup> *Id.* at 523.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 140 S. Ct. 1731, 1739 (2020).

<sup>101</sup> *Id.*

based on sexual orientation or gender identity.<sup>102</sup> The Court focused on the language of Title VII, which “prohibits employers from taking certain actions ‘because of’ sex.”<sup>103</sup> This means that so long as an employee’s sex was at least one of the reasons behind the decision to terminate the employment, then Title VII is violated.<sup>104</sup> While the Court’s holding is specific to Title VII and employment, the same interpretation should be applied to Title IX in schools. The Court stated, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>105</sup> Title IX does not specifically define the term “sex”; however, courts should apply the Supreme Court’s definition of sex in Title VII cases to Title IX cases as well. Title IX protects against discrimination based on sex in schools, and while this differs from Title VII’s prohibition of sexual discrimination in employment, the underlying issues remain the same. The Court held that discrimination based on an individual’s gender identity is discrimination based on sex.<sup>106</sup> Based on this holding, discrimination against a transgender student athlete in interscholastic athletics is discrimination based on the student’s sex.

## VII. CONNECTICUT AND THE U.S. DEPARTMENT OF EDUCATION

In 2011, Connecticut amended its prohibited discriminatory employment practices to include gender identity.<sup>107</sup> Currently, Connecticut is one of the sixteen states whose transgender student-athlete regulations are considered inclusive.<sup>108</sup> The state’s policy is to

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<sup>102</sup> *Id.* at 1759. In each of three cases, an employer fired a long-time employee shortly after the employee came out as homosexual or transgender. The employers gave no other reason for termination other than the employee’s sexuality or gender. *Id.* at 1737.

<sup>103</sup> *Id.* at 1739.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1741. The Court gave the following example to further explain its point: if an employer fires a transgender person who identified as male at birth and now identifies as female, and the employer retains an otherwise identical employee who was identified as female at birth, then the employer intentionally penalized a person identified as male at birth for traits that it tolerates from an employee identified as female at birth. The employee’s sex plays a clear and unmistakable role in the discharge decision. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> CONN. GEN. STAT. ANN. § 46a-60 (West 2019).

<sup>108</sup> See *K-12 Policies*, *supra* note 5.

provide transgender athletes with equal opportunities to participate in athletic programs consistent with their gender identity.<sup>109</sup> Connecticut's regulations have recently been challenged because of transgender girl athletes who have been competing in high school track on the girl's team.<sup>110</sup> The U.S. Department of Education's Office for Civil Rights (DOE) determined that the states' rules violate female student's Title IX rights.<sup>111</sup> The DOE tasked the Connecticut Interscholastic Athletic Conference (CIAC) and six school districts to come up with a plan to address the violation, or risk losing their federal funding.<sup>112</sup> The DOE wrote that Connecticut's policy is a violation of Title IX because it "denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher-level competitions, awards, medals, recognition, and the possibility of great visibility to colleges and other benefits."<sup>113</sup>

Title IX enforcement from the DOE springs from a complaint filed with the Department by three girls, claiming that their Title IX rights were violated when a transgender girl was allowed to compete in track and field.<sup>114</sup> The three girls claimed that they were deprived of top finishes in competitions and possible college scholarships because of the transgender girls who competed against them.<sup>115</sup> The complaint, filed on behalf of the girls by the conservative group Alliance Defending Freedom, suggests that allowing transgender girls to participate in sports with their gender identity gives them an unfair physical advantage over cisgender girls.<sup>116</sup> Additionally, the girls filed

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<sup>109</sup> CONN. INTERSCHOLASTIC ATHLETIC CONF *CIAC*, REFERENCE GUIDE FOR TRANSGENDER POLICY, (2011) [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_a86a597d90a84de690bb2349e0b3cdba.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_a86a597d90a84de690bb2349e0b3cdba.pdf)

<sup>110</sup> Pat Eaton-Robb, *U.S. Education Department Rules Connecticut Transgender Policy Is Violation Of Title IX*, PRESS HERALD (May 28, 2020) <https://www.pressherald.com/2020/05/28/office-of-civil-rights-rules-connecticut-transgender-policy-is-a-violation-of-title-ix>.

<sup>111</sup> See U.S. Dep't of Educ., *Impending Enforcement Letter* (May 15, 2020), <http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>.

<sup>112</sup> *Id.*

<sup>113</sup> Eaton-Robb, *supra* note 110.

<sup>114</sup> Kathleen Megan, *A Federal Agency Says Connecticut Must Keep Trans Students From Girl's Sports. The State Disagrees.*, The CT Mirror (June 15, 2020), <https://ctmirror.org/2020/06/15/a-federal-agency-says-connecticut-must-keep-trans-students-from-girls-sports-the-state-disagrees>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

a federal lawsuit in February 2020, seeking an injunction to prohibit the CIAC from allowing transgender students to participate in girl's sport, as well as expunge the names of transgender girls from all sports records.<sup>117</sup>

The DOE's letter prohibiting transgender student-athletes from participating in sports with the gender they identify as violates the Title IX rights of transgender individuals. CIAC released a statement concluding that:

Connecticut law is clear and students who identify as female are to be recognized as female for all purposes—including high school sports . . . To do so otherwise would not only be discriminatory but would deprive high school students of the meaningful opportunity to participate in educational activities, including inter-scholastic sports, based on sex-stereotyping and prejudice sought to be prevented by Title IX and Connecticut state law.<sup>118</sup>

Enforcing this policy would directly violate Connecticut state law, which prohibits discrimination on the basis of gender identity.<sup>119</sup>

A federal judge has dismissed this case because not only did the two transgender athletes have since graduated high school, but there was no indication that the plaintiffs would compete against a transgender student next season.<sup>120</sup> The court points out that while it is possible for a transgender student to still participate in girls' track at that time, the athletes would still have to compete in the same races and achieve substantially similar times.<sup>121</sup> Additionally, the court added that if the plaintiffs end up competing against another

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<sup>117</sup> *Id.*

<sup>118</sup> *Connecticut Transgender Policy Found To Violate Title IX*, ESPN (May 28, 2020), [https://www.espn.com/espn/story/\\_/id/29234386/connecticut-transgender-policy-found-violate-title-ix](https://www.espn.com/espn/story/_/id/29234386/connecticut-transgender-policy-found-violate-title-ix).

<sup>119</sup> CONN. GEN. STAT. § 46a-51 (current with all enactments of the 2020 Regular Session, the 2020 July Special Session, and the 2020 September Special Session). The law states that "'gender identity or expression' means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." *Id.*

<sup>120</sup> *Soule v. Conn. Ass'n of Schs.*, No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Civ. R. Apr. 25, 2021).

<sup>121</sup> *Id.*

transgender athlete, then they can file a new action for a preliminary injunction.<sup>122</sup>

### VIII. ARGUMENT FOR SUGGESTED POLICY CHANGE

States with discriminatory or neutral policies for transgender student athlete participation are violating the transgender individual's Title IX participation. Title IX protects all persons from discrimination based on their sex.<sup>123</sup> The term sex should include the gender identity of transgender individuals who identify as a different gender than they were born as. The Supreme Court defined sex to include transgender male and females gender identities.<sup>124</sup> Courts should interpret Title IX's ambiguous language to include transgender individuals in order to give their rights the same protection as their cisgender peers. Children who genuinely believe they were born as the wrong gender should not be subject to having their rights infringed upon. Transgender athletes are being excluded from opportunities and benefits that sports teams provide when they are restricted from playing with the gender they identify with. Policies that restrict transgender athletes from playing alongside their gender identity further discriminate against the transgender youth who would greatly benefit from the social and physical aspects of high school sports.

The argument against transgender inclusion in sports is based on society's definitions of masculine attributes.<sup>125</sup> As discussed earlier, the Connecticut girls who filed the lawsuit against the CIAC, assume that Yearwood and Miller, the transgender track athletes, have an unfair advantage; however, this complex issue would be difficult to prove.<sup>126</sup> It is extremely unlikely that anyone could prove that the three girls would have won races or received college scholarships had the transgender athletes not competed against them. Yearwood explained the many differences among athletes give one a physical advantage over the other, such as a high jumper having longer legs or a sprinter whose parents spend more money on personal training.<sup>127</sup> If this were

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<sup>122</sup> *Id.*

<sup>123</sup> 20 U.S.C. § 1681.

<sup>124</sup> *Bostock*, 140 S.Ct.1731.

<sup>125</sup> See *Connecticut Transgender Policy Found to Violate Title IX*, *supra* note 118.

<sup>126</sup> *Id.*

<sup>127</sup> Pat Eaton-Robb, *Connecticut Girls Sue to Block Participation of Transgender Track Athletes*, CBS BOSTON (Feb. 12, 2020, 4:00 P.M.),

the case, students would only be allowed to compete against other students of similar build and physical ability to level the playing field.

Courts continue to address the debate over boys' and girls' different physical abilities. In *Attorney General v. Massachusetts Interscholastic Athletic Association*,<sup>128</sup> the Supreme Judicial Court of Massachusetts addressed a rule barring boys from playing on a girls' team even though girls could play on boys teams.<sup>129</sup> The court held that it could not justify a rule based on the physical differences between males and females because they are not uniform.<sup>130</sup> This standard should be applied to transgender individuals as well. State policies that block transgender athletes from participating on their preferred gender's sports team on the basis of physical differences should be struck down.

Out of the three girls in the Connecticut lawsuit, only two have ever competed against the transgender girls, Yearwood and Miller.<sup>131</sup> The two girls who competed against Yearwood beat her in the 100-meter race.<sup>132</sup> Furthermore, one of the girls beat Miller in another race four days later.<sup>133</sup> These results dismantle the main argument of this lawsuit that being a transgender athlete robs cisgender girls of the opportunity to win. This is a clear example of a cisgender female athlete beating a transgender athlete, despite the physical advantages transgender athletes are alleged to have. These factors must be taken into consideration when deciding on policies that could infringe on an individual's rights.

Finally, the argument that the transgender athletes take away potential college scholarships for the three biologically female students is invalid. While both transgender runners decided that their track careers were likely over, one of the two cisgender girls in the suit, a high school senior, signed with a Division I college to run on its

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<https://boston.cbslocal.com/2020/02/12/transgender-track-runners-lawsuit-connecticut-terry-miller-andraya-yearwood>.

<sup>128</sup> 393 N.E.2d 284 (Mass. 1979). In this case the attorney general sought a declaration that the Interscholastic Athletic Association's rule that boys may not play on girls' teams violated the Massachusetts Equal Rights Amendment. The rule had caused issues across the state when a boy wanted to compete in a sport for which only a girls' team existed. *Id.*

<sup>129</sup> *Id.* at 285.

<sup>130</sup> *Id.* at 293.

<sup>131</sup> See Barnes, *supra* note 1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

women's track team.<sup>134</sup> The second senior planned to compete on the women's track team at a different Division I school.<sup>135</sup> Here, the facts reveal a flaw in their argument, considering the girls had not only won races against Yearwood and Miller, but also had plans to continue on to Division I track teams.<sup>136</sup> Regardless of the Title IX argument for both sides of this case, the possible policy change would violate Connecticut's anti-discrimination law.<sup>137</sup>

There is an immediate need for every state to adopt and enforce the same inclusive policy for transgender student athletes. At the moment, a student's school district is the sole factor determining whether a transgender child will be included in sports due to the varying state policies.<sup>138</sup> A transgender athlete in New York is not granted the same protection as a transgender athlete in Alabama.<sup>139</sup> Without a uniform policy, transgender individuals' rights depend upon the state in which they reside, resulting in a one-sided decision that the individual has no control over.<sup>140</sup>

#### A. Policy Suggestion

It is important to acknowledge that a full policy overhaul in states with non-inclusive policies may be too drastic a change.<sup>141</sup> However, through education, a realistic uniform policy is possible. Additionally, there should be some limits to inclusion as to ensure fairness.<sup>142</sup>

This uniform policy should allow transgender students to play sports with their affirmed gender, without the requirement of hormone therapy or sex-changing surgery. Transgender children should not be forced to undergo surgery or hormone treatments, as surgery is

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *K-12 Policies*, *supra* note 5.

<sup>139</sup> *Id.*

<sup>140</sup> See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 11.

<sup>141</sup> See *K-12 Policies*, *supra* note 5.

<sup>142</sup> MD. PUBLIC SECONDARY SCHOOLS ATHLETIC ASS'N, MPSSAA TRANSGENDER PERSON GUIDANCE FOR PARTICIPATION IN INTERSCHOLASTIC ATHLETICS (2014), [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_c27051cd7b4a48759fcc5c77e34f7fab.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_c27051cd7b4a48759fcc5c77e34f7fab.pdf). Some limits on inclusion are important to ensure that students playing on a team with a gender inconsistent with their birth gender are in fact transgender. *Id.*

expensive and inconvenient, especially for children.<sup>143</sup> Even though some students may be able to afford the surgery, those who are unable to are automatically ineligible due to their socioeconomic status.

It must be recognized that allowing students to play on any gender's sports team, without review, could be unfair. Therefore, transgender students should be required to show some confirmation of transition of their gender in order to ensure fairness.<sup>144</sup> Documentation that shows the transgender students have transitioned to their gender identity, such as medical documentation or a doctor's note of any treatment or counseling, or school registration records should be sufficient enough proof. However, some schools may not recognize the transgender student's gender in their records. In this case, the student should be reviewed for eligibility through interviews with a committee of professionals who have experience in gender identity health care. Additionally, there should be an appeal process for the student to undergo if the school denies the original request. This process should include a hearing with a new committee comprised of physicians, licensed mental health professionals, school administrators from different districts and an advocate familiar with transgender issues.

The combination of California's policy<sup>145</sup> and Maryland's policy<sup>146</sup> would be an ideal model for the rest of the states. California has a very inclusive policy, which grants all students the opportunity to participate in sports consistent with their gender identity, regardless of their school records.<sup>147</sup> Unless there is a challenge by the school, the student's request is approved.<sup>148</sup> If the decision is challenged, the student may appeal and a hearing before an eligibility committee will be scheduled.<sup>149</sup> Maryland's policy is also inclusive, but at a lower

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<sup>143</sup> Malika Andrews, *How Should High Schools Define Sexes for Transgender Athletes?*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/sports/transgender-athletes.html>.

<sup>144</sup> See Griffin, *supra* note 81.

<sup>145</sup> See *K-12 Policies*, *supra* note 5.

<sup>146</sup> *Id.*

<sup>147</sup> CALIFORNIA INTERSCHOLASTIC FEDERATION, GUIDELINES FOR GENDER IDENTITY PARTICIPATION (2019), [https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc\\_75388a5135094dd999ac5a57bead97b7.pdf](https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_75388a5135094dd999ac5a57bead97b7.pdf).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* This committee is comprised of (a) a physician with experience in gender identity health care and the World Professional Association for Transgender Health

level.<sup>150</sup> Its policy states that transgender students can participate on the interscholastic athletics team of their birth gender or the gender to which the student has transitioned.<sup>151</sup> However, if students decide to play on the team with their affirmed gender, these students are required to show either medical documentation confirming their transition, or official school records that recognize their transition.<sup>152</sup> This is to ensure fairness that any students playing with the gender they identify as are actually transgender.<sup>153</sup>

A combination of these two states' policies would allow for transgender students whose schools do not recognize them by their preferred gender to still be granted the same opportunities as those of their peers. Transgender student athletes would have to provide medical documentation or school records in order to prove their transition. If such documentation does not exist, a hearing would be scheduled before an eligibility committee. The committee should resemble California's policy to include medical professionals who are familiar with gender identity issues, school administrators, and advocates for transgender rights.<sup>154</sup> The hearing should consist of interviews between the student and professional committee where the student may submit any relevant supportive documentation, such as written statements from family, peers or medical professionals.<sup>155</sup>

This policy would protect the Title IX rights of transgender athletes across the country. It is inclusive of transgender students, while still fair to cisgender students. A uniform policy modeled after Maryland's policy would ensure that transgender student-athletes receive the same benefits of participating in athletic programs that their

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(WPATH) Standards of Care; (b) a psychiatrist, psychologist or licensed mental health professional familiar with WPATH Standards of Care; (c) school administrator from a non-appealing school; (d) a CIF staff member; and (e) an advocate familiar with gender identity and expression issues. *Id.*

<sup>150</sup> See *K-12 Policies*, *supra* note 5.

<sup>151</sup> See MD. PUBLIC SECONDARY SCHOOLS ATHLETIC ASS'N, *supra* note 142.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* California requires the appealing student to provide the committee with the following documentation: (a) current transcript and school registration information; (b) documentation of student's consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care provider); and (c) any other pertinent documentation or information. *Id.*

peers receive. Children should not be discriminated against in sports for their gender identity.

## IX. COUNTERARGUMENT

Many argue that including transgender students in athletic programs is unfair to the athletes who compete with the gender they were born as.<sup>156</sup> As discussed earlier, Connecticut is currently facing complaints from three girls who consider it unfair to compete against boys who have transitioned to girls.<sup>157</sup> The main argument for this stance is that allowing these students to compete takes away opportunities for girls to win and is based on societal stereotypes of boys, by assuming that boys are naturally better at sports than girls.<sup>158</sup> Society's definition of masculinity is the basis for those who believe a transgender student would be at an unfair advantage when competing with girls.<sup>159</sup> It is inaccurate to assume that "all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people."<sup>160</sup> Longtime coach and sports policy expert, Helen Carroll, states "[f]or the past nine years transgender athletes have been able to compete on teams at NCAA member collegiate and universities consistent with their gender identity like all other student-athletes with no disruption to women's collegiate sports."<sup>161</sup> The fear that the inclusion of transgender athletes in high school athletics would ruin women's sports is misplaced because it has not happened yet in inclusive organizations like the NCAA.<sup>162</sup>

It is important to note that transgender girls who medically transitioned at an early age do not go through a male puberty; thus, the argument that transgender athletes have an advantage over non-transgender girls is even further weakened.<sup>163</sup> The idea that

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<sup>156</sup> See Barnes, *supra* note 1.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 11.

<sup>160</sup> *Id.*

<sup>161</sup> Dawn Ennis, *Betsy Devos Tells Connecticut: Ban Transgender Athletes, Or Say Goodbye to Your Federal Funding*, FORBES (May 29, 2020), <https://www.forbes.com/sites/dawnstaceyennis/2020/05/29/betsy-devos-tells-connecticut-ban-transgender-athletes-or-say-goodbye-to-your-federal-funding/?sh=484f36e17930>.

<sup>162</sup> *Id.*

<sup>163</sup> See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 11.

transgender women have a competitive advantage is not supported by evidence.<sup>164</sup> Stereotypes often label transgender women as unusually tall and large boned; however, this is an overgeneralization and assumes all bodies are the same.<sup>165</sup>

Ultimately, the argument that transgender women's bodies give them a physical advantage is flawed. In high school sports, student-athletes are all of varying shapes and sizes. On both girls' teams and boys' teams, some students are fully developed and others have yet to reach puberty but compete against each other.<sup>166</sup> Athletic programs would have to create teams where each student is of similar stature to even the playing field to comply with the argument that transgender women shouldn't be allowed to participate on girls' teams due to their physique.

Every student's physical ability differs from that of another, regardless of gender. Student-athletes are not stripped of opportunities others receive when they compete against an athlete who is overall better at the sport than they. Physical features hold little value to an athlete if they do not have the skill.<sup>167</sup> High school sports will always be competitive, with a wide range of athleticism. One of the two-transgender athletes from Connecticut broke her silence about the current lawsuit concerning her physical abilities, arguing that a person's physical abilities vary from athlete to athlete based on numerous differences.<sup>168</sup> Transgender athletes do not create an unfair advantage for other athletes any more than the basic bodily developments of youths.<sup>169</sup>

School sports are an integral part of the education process for children.<sup>170</sup> Discriminatory policies take away developmental opportunities for transgender students, which can detrimentally effect their ability to develop to their full potential.<sup>171</sup> Further, all students would benefit from an inclusive environment, not only transgender

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Emily Grubman, *Sex Is Not a Three-letter Word: The Effect of Manipulating the Definition of "Sex" on the Future of Transgender Athletes*, 40 LOY. L.A. ENT. L. REV. 161, 199 (2019).

<sup>168</sup> See Eaton-Robb, *supra* note 110.

<sup>169</sup> See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 11.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

student-athletes.<sup>172</sup> The students develop respect for those who are different from themselves, as well as overcoming stereotypes and prejudice about diverse groups.<sup>173</sup>

## X. A STEP TOWARD THE FINISH LINE

Only hours after being inaugurated, President Biden issued an Executive Order (EO) on Preventing and Combating Discrimination Based on Gender Identity or Sexual Orientation.<sup>174</sup> While the Executive Order does not currently change any policies for public schools or state Title IX by name, it does show a significant shift in attitude towards transgender students' rights by the Biden administration.<sup>175</sup> The EO states, "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation."<sup>176</sup> Further, the Order notes "[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."<sup>177</sup> The Order references the holding in *Bostock v. Clayton County*,<sup>178</sup> which extends Title VII's prohibition of discrimination based on sex to cover gender identity and sexual orientation.<sup>179</sup>

President Biden's order directs the head of every federal agency to review "all existing orders, regulations, guidance documents, policies, programs, or other agency actions under any statute or regulation that prohibits sex discrimination and determine

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Neeru "Nina" Gupta & Suzann M. Wilcox, *Transgender Students and Title IX: Biden Administration Signals Shift*, THE NAT'L L. REV. (Jan. 29, 2021), <https://www.natlawreview.com/article/transgender-students-and-title-ix-biden-administration-signals-shift>.

<sup>175</sup> *Id.*

<sup>176</sup> President Joseph R. Biden Jr., *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation>.

<sup>177</sup> *Id.*

<sup>178</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). In this case, a gay man was terminated from his job for his sexual identity. The Court held that Title VII of the Civil Rights Act of 1964 protects employees from discrimination by their employer because of their sexual identity. *Id.*

<sup>179</sup> See President Joseph R. Biden Jr., *supra* note 176.

whether those items are consistent with the EO.”<sup>180</sup> Additionally, the order requires federal agencies to, within 100 days of the order, work with the Attorney General to create a plan to implement the actions identified in its policy review.<sup>181</sup> This broad mandate will likely push agencies to update their guidance implementing policies that prohibit sex discrimination.<sup>182</sup> Congress should enact new legislation in the near future to specifically address transgender students in interscholastic athletics.

President Biden faced a lot of backlash for this order, with some groups stating it would threaten the rights of women.<sup>183</sup> The day after the order was issued, the hashtag #BidenErasedWomen was trending on Twitter.<sup>184</sup> Chase Strangio, the Deputy Director for Transgender Justice at the American Civil Liberties Union responded to this argument stating, “at core all the newly-elected president did was lay out what the law is and agree, unlike his predecessor, to follow it.”<sup>185</sup> The order shows that this administration is prepared to defend and enforce protections for transgender individuals under federal law.<sup>186</sup> While there will always be backlash and disagreement for the President’s actions, the country is likely taking a step in the right direction to ensure transgender students can enjoy the same rights as their peers.

Transgender students across the United States should not continue to be excluded from the daily activities that their cisgender peers enjoy. Every time students are barred from playing on a sports team with the gender they identify as, the students’ Title IX rights are violated. States must have inclusive policies for their transgender students. It is time for children to feel safe and accepted for being who they are. Our schools must address these issues of basic fairness and

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Samantha Schmidt, Emily Wax-Thibodeaux & Moriah Balingit, *Biden Calls for LGBTQ Protections in Day 1 Executive Order, Angering Conservatives*, THE WASH POST (Jan. 21, 2021), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/>.

<sup>184</sup> *Id.*

<sup>185</sup> Chase Strangio, *What President Biden’s LGBTQ Executive Order Does and Doesn’t Do*, ACLU (Jan. 21, 2021), <https://www.aclu.org/news/lgbt-rights/what-president-bidens-lgbtq-executive-order-does-and-doesnt-do>.

<sup>186</sup> *Id.*

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equity in order to accommodate all students.<sup>187</sup> At such an important developmental time in their lives, children need to be raised in an inclusive community where they can be free of the fear of discrimination.

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<sup>187</sup> See *NCAA Inclusion of Transgender Student-Athletes*, *supra* note 11.